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No. 90-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW,
Petitioner,

v.

JOHN GILBERTSON, JOHN V. REITZ, and ANTHONY CATALAN, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether private actions for damages, authorized by implication under § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated thereunder, should be governed by the uniform one and three year statutes of limitations applicable to express antifraud private causes of action created by the Securities Act of 1933 and the Securities Exchange Act of 1934 rather than by limitations periods derived from the laws of the various States.

LIST OF PARTIES

In addition to the respondents named in the caption, the following parties were appellants in the court below:

Clifford B. Alterman, John Ball, Ruth Beecher, Theodore Beecher, Carolyn Beecher, Walter L. Beers, Robert E. Boekenoogen, Charles W. Botsford, Robert Callahan, Bonnie J. Chambers as Conservator of the Estate of Robert W. Chambers, Joan Chatham, Ronald Chatham, Cliff Chulos, Perry Coleman, David Collier, Leo DePretto as Personal Representative of the Estate of Howard E. White, Arlyss D. Dunham, Jack E. Evans, Janice Gilbertson, Robert A. Graham, Harry E. Groth, Jr., William L. Gunnell, Woodrow Gwyn, Floyd E. Hambleton, Robert E. Johnson, Ronald Kirkilie, Judith MacDonald, Nickolas J. Madesh, Jerry E. Marks, H. Winston Marshall, Jay L. Maxwell, Maxwell McDonald Investments, David McCullam, James R. McDonald, Ward E. Moore, Ethel Nunemacher, Howard H. Overback, Elman Peterson, Jr., Dale R. Peterson, Joseph C. Player, Deane E. Reimann, Earl D. Riddle, Harlan C. Selby, Bruce Sigman, Edith Trykar, Theodore Trykar, C. Wayne Warren, R. Mattison White, Paul Winklesky, Larry G. Zettle.

In addition to petitioner, the following parties were appellees in the court below:

Alanthus Computer Corp., Alanthus Corp., Arnheim & McCostis, Anders G. Arnheim, Berlent Industries, Inc., Harvey N. Berlent, Buhler Software Services, Ronald Buhler, Comdisco, Inc., Computer Value Associates, John M. Costello, James B. Cuthbert, Jerrold Feingold, Leonard Feingold, Edward G. Fizell, Global Computer Corp., Mark A. Hanson, Richard A. Heitmeyer, Robert M. Hurwitz, Jeflen Consulting Corp., Ronald Johnson, Martin S. Karnoff, Robert M. Kirby, Kirby Microprocessors, Inc., Kirby Computer Systems, Inc., Leasing Consultants Associates, Leasing Consultants, Inc., David G. Marks, Richard M. McCostis, William L. McKenna, P-Stat, Inc., Martin D.

Pine, Kenneth M. Pontikes, Gordon S. Rosen Associates, Gordon S. Rosen, Noah Schreiber, Software Systems for Word Processors, Inc., Start Systems, Inc., Technical Marketing Services, Texcom Equipment Corp., Leonard F. Turi, William A. Ward, Robert A. Weber, Richard A. Wellbrock, Wayne Hamersly, Sherman Kellar, Mack, Roberts, Hoyle & Co., Roger Nelson, Paulson Investment Co., James D. Quenemoen, Rockwood Computer Corp., Michael Welwood, R. G. Williams.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-333

LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW,
Petitioner,

v.

JOHN GILBERTSON, JOHN V. REITZ, and ANTHONY CATALAN, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The February 5, 1990 memorandum decision of the United States Court of Appeals for the Ninth Circuit (Pet. App. 8a-18a), and the July 13, 1988 opinion of the United States District Court for the District of Oregon (Pet. App. 22a-43a) are not published.

JURISDICTION

The decision and judgment of the Court of Appeals (Pet. App. 8a-18a) were filed on February 5, 1990. A petition for rehearing with a suggestion for rehearing *en banc* was

denied on May 16, 1990. Pet. App. 19a-21a. The petition for writ of certiorari was timely filed on August 10, 1990. The petition was granted on October 9, 1990. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULES

This case principally involves the following statutes, regulations, and rules, which are set out verbatim in the Appendix to this Brief.

1. Sections 11(a)-(b), 12 and 13 of the Securities Act of 1933, 15 U.S.C. §§ 77k(a)-(b), 77*l* and 77m.

2. Sections 9(a)-(c), 9(e), 10(b), 16(b), 18(a), 18(c), 20A and 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(a)-(c), 78i(e), 78j(b), 78p(b), 78r(a), 78r(c), 78t-1 and 78cc(b).

3. Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5.

STATEMENT OF THE CASE

This case arises from the sale of what the plaintiffs below have characterized as "tax shelter limited partnerships." J.A. 17, 124. In 1979, 1980 and 1981, units in several separate Connecticut limited partnerships were offered to investors in Oregon and several other States. The partnerships were designed and promoted by various individuals and their related entities.[1]

Each limited partnership was described in an investment memorandum. Petitioner Lampf, Pleva, Lipkind, Prupis &

[1] The facts taken from the pleadings are presumed true for the purpose of the proceedings before this Court. The complaints alleged that the individual defendants who organized the partnerships were citizens of New Jersey and that their related entities included a New Jersey partnership and a Delaware corporation with its principal place of business in New Jersey. J.A. 22-23, 129, 231.

Petigrow ("Lampf") is a New Jersey law firm that allegedly prepared a "model offering memorandum" that served as the basis for the investment memoranda in most of the partnerships and also prepared tax opinions that appeared as exhibits to the investment memoranda for those partnerships. Each investment memorandum described transactions that would be made by the partnership consisting of the purchase and the leasing to others of certain computer equipment and software.[2]

The partnerships closed in 1979, 1980 and 1981. The last purchases by any investors involved in this case occurred in June 1981. J.A. 108, 210. During the succeeding years, the investors received periodic written reports regarding the partnerships' progress. *See* Pet. App. 31a. Without exception, the reports notified the limited partners that the partnerships were economic failures.

In 1986, after the Internal Revenue Service began to disallow the investors' tax benefits, a broker-dealer who had sold some of the partnership interests agreed to finance investors' lawsuits in exchange for a release from liability. Two suits were filed on November 3, 1986, in the United States District Court for the District of Oregon. J.A. 5, 9. A third suit was filed on June 4, 1987 in the same court. J.A. 14. All three suits alleged federal claims under § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (the "§ 10(b) claims"); § 17(a) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C.

[2] The investors have also sued the New York and New Jersey parties who sold the equipment to the partnerships (J.A. 23, 130, 231-32), the New York and Texas equipment appraisers identified in the investment memoranda (J.A. 25, 132, 233-34), the New York and New Jersey residents who appraised the software (J.A. 25-26, 132-33, 234), the equipment lessees, who were from Delaware, Illinois, New York, and North Carolina (J.A. 23-24, 130, 232), and software marketing companies from New York, New Jersey and Pennsylvania (J.A. 22-23, 129, 231).

§ 77q(a); and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968; as well as pendent state law claims.

The District Court consolidated the cases for discovery and ordered that discovery be limited initially to matters relevant to the statute of limitations. In February 1988, petitioner Lampf and other defendants moved for summary judgment on the grounds that the actions were not timely filed. On July 13, 1988, the District Court issued its opinion granting summary judgment in favor of defendants. *See* Pet. App. 22a-43a. The District Court did not address Lampf's argument that § 10(b) claims should be governed by a uniform federal statute of limitations. Instead, applying Oregon's two-year statute of limitations for fraud, the court held that the investors' § 10(b) claims were time-barred because they had failed to file suit within two years after they were put on "inquiry notice" of their potential claims. *See* Pet. App. 43a. The District Court dismissed all three cases. J.A. 253-54.[3]

The Ninth Circuit reversed, holding that there were issues of material fact relating to the investors' notice of their § 10(b) claims and the defendants' alleged fraudulent concealment of those claims. Pet. App. 10a, 16a. Like the District Court, the Ninth Circuit applied Oregon's two-year fraud limitations period and did not expressly address Lampf's argument that federal law should provide the limitations period for § 10(b) claims. Pet. App. 12a.

Lampf filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on May 16, 1990. On June 20, 1990, the Court of Appeals denied Lampf's motion for stay of issuance of the mandate. Lampf

[3] The District Court dismissed the claims brought under § 17(a) of the 1933 Act on the ground that § 17(a) does not create a private right of action. Pet. App. 34a. It also dismissed the RICO counts as untimely and declined to retain pendent jurisdiction over the state claims. Pet. App. 43a.

filed its petition for writ of certiorari on August 10, 1990, and the petition was granted on October 9, 1990.

If, as determined by the Court of Appeals, the Oregon statute of limitations is applicable to the § 10(b) claims in this case, litigation will continue in the District Court over when the plaintiffs' claims were discovered. If, on the other hand, the statute of limitations applied to this case is drawn from the federal securities laws as urged by petitioner, the claims will be time-barred.

SUMMARY OF ARGUMENT

This case presents a clear and compelling choice for the Court: should private civil actions for damages authorized by implication under § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 ("§ 10(b) cases") be governed (1) by statutes of limitations selected individually on a case-by-case, plaintiff-by-plaintiff basis from the myriad of potential laws found in the statutes of fifty States, or (2) by the specific limitations period explicitly selected by Congress to govern the "comparable express causes of action" (*Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975)) that it created at the same time that it enacted § 10(b)?

This Court has determined that, " '[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.' " *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) (quoting *Chardon* v. *Dumaro Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). Yet the existing practice of borrowing state limitations periods in § 10(b) cases pulls in the opposite direction. Indeed, it is such a "nightmare" that "[w]ith a unanimity unmatched in any other corner of securities law, *everyone* wants a simpler way—and to everyone that means a uniform federal statute of limitations." *Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990) (emphasis added), *cert. pending* (No. 90-526). This case offers the Court the opportunity to adopt for § 10(b)

actions the limitations period embraced by Congress for the principal nonderivative counterparts to § 10(b) and thereby to eliminate the chaos that has overtaken and threatens the effectiveness of private § 10(b) actions.

The Securities Act of 1933 and the Securities Exchange Act of 1934 "constitute interrelated components" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 206 (1976)) of the comprehensive national regime enacted by the Seventy-Third Congress to regulate the interstate marketing of securities. These two laws contain several express prohibitions of misleading and deceptive practices in the marketing of securities and establish explicit private rights of action for violations of these provisions. Section 10(b) of the 1934 Act was intended to supplement these provisions; to be a "catch-all" to enable the newly created Securities and Exchange Commission to prohibit new and innovative manipulative devices and schemes not explicitly addressed in the two Acts. While § 10(b) did not expressly create a private right of action, the courts soon discerned one and the implied § 10(b) action is now an accepted constituent of the national securities enforcement scheme.

The problem presented by this case arose because, in the absence of an explicit federal statute of limitations for § 10(b) cases, the federal courts applying the § 10(b) right of action turned almost uniformly to state laws as the source of limitations periods to govern those actions. But this practice has resulted in confusion, inefficiency, inconsistency, unpredictability, delay and forum shopping. Each State has one or more limitations period for fraud, securities law violations, contract claims or other transgressions that might serve as a limitations period for a § 10(b) claim. A federal court grappling with a typical § 10(b) claim, which is invariably multistate in nature and is often a class action involving plaintiffs and defendants from many States, must select a suitable limitations period for

each individual claim. The consequence has been a complete lack of consistency. The process has been complicated exponentially by the application of different state and federal tolling periods, changes in state laws, and different analyses by federal judges throughout the Nation. Results vary from circuit to circuit, state to state, district to district and even from plaintiff to plaintiff within a particular case. Plaintiffs seek out the forum with the most felicitous limitations period, and the courts and litigants spend vast resources resolving disputes over the appropriate statute to apply.

The problems created by applying numerous potential state limitations periods to § 10(b) claims have become intolerable. "Never has the process been more enervating than in securities law . . . . [T]he courts of appeals disagree on every possible question about limitations periods in securities cases. Only Congress or the Supreme Court can bring uniformity to this field . . . ." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987).

Fortunately, the Court has made clear in its recent jurisprudence that no statute and no pronouncement of this Court compels the chaos that has come to characterize the limitations-period phase of § 10(b) litigation. In *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court flatly rejected the notion that federal courts must always apply the most analogous state statute of limitations to federally created rights when the statute creating those rights is silent on the proper limitations period. Instead, the task is to " 'borrow' " "the most suitable statute." *DelCostello*, 462 U.S., at 158. While state law may often supply that analogy, state statutes may be particularly unsatisfactory vehicles for the enforcement of federally created rights if "all claims arising out of the federal statute 'should be characterized in the same way' " for limitations period purposes rather

than " 'differently depending upon the varying factual circumstances and legal theories presented in each individual case.' " *Agency Holding Corp.*, 483 U.S., at 147 (quoting *Wilson* v. *Garcia*, 471 U.S., at 268). In those instances, " 'it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.' " *Agency Holding Corp.*, 483 U.S., at 147 (quoting *DelCostello*, 462 U.S., at 161). If a federal law provides " 'a closer analogy' " than state statutes, and if " 'the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking,' " the Court has " 'not hesitated' " to select the federal standard. *Agency Holding Corp.*, 483 U.S., at 148 (quoting *DelCostello*, 462 U.S., at 171-72).

Selecting a federal limitations period is particularly appropriate where the right of action is implied by the courts from a federal regulatory scheme that does contain a limitations period for comparable express rights of action, in contrast to a situation involving an express federal right of action for which Congress affirmatively chose not to enact a limitations period.

Section 10(b) presents a paradigmatic context for applying the standard articulated in *DelCostello* and *Agency Holding Corp.* to recognize a federal limitations period for implied federal rights of action being litigated in federal courts. Section 10(b) cases involve rights derived from a federal statute, are litigated exclusively in federal courts pursuant to federal rules of evidence, and are inevitably multistate in nature. These cases may arise in an infinite variety of contexts and present an unlimited array of factual circumstances. It is flatly inconsistent with the concept of a uniform national scheme of securities regulation for these cases to be litigated to different conclusions depending upon the accident of the location of the particular federal forum in which they are presented. *Cf. Reves* v. *Ernst & Young*, 110 S. Ct. 945, 954 (1990). Congress ordained a cohesive and comprehensive regulatory regime for securities laws, not a potpourri of inconsistent, conflicting and confusing regulations that encourage vexatious litigation and spawn uncertainty in the marketplace. *See Blue Chip Stamps*, 421 U.S., at 739-41.

There can be no doubt that the Congress that adopted § 10(b) would have chosen for § 10(b) actions the same federal limitations period that it debated and embraced for the "comparable express" (*id.*, at 736) private antifraud remedies it created simultaneously rather than the uncertain, variable and constantly changing array of state limitations periods. No goal is served by requiring courts to distinguish between the different factual and legal contexts in which § 10(b) cases may arise. In fact, the confusion and the waste of judicial and private resources generated by this existing system undermine severely not just the congressional goals that motivated § 10(b) but also the fundamental purposes of uniformity and consistency that underlie both the 1933 and 1934 Acts.

The standards articulated by the Court in *DelCostello* and *Agency Holding Corp.* lead inexorably to the conclusion that there is a " 'federal law [that] clearly provides a closer analogy than available state statutes'." *Agency Holding Corp.*, 483 U.S., at 148 (quoting *DelCostello*, 462 U.S., at 171-72). And the "federal policies at stake and the practicalities of litigation make that rule" not simply "a significantly more appropriate vehicle for interstitial lawmaking" but the *only* rule for § 10(b) that reflects Congress' considered judgment concerning the balance to be struck between the interests of defrauded investors and the importance to the investment community and the national economy of certainty, stability and repose.

The private rights of action for securities fraud expressly created in §§ 11 and 12 of the 1933 Act and §§ 9, 18 and 29 of the 1934 Act must all be initiated within one year of discovery but no later than three years after the violation. Congress not only debated the wisdom of

the length of these limitations periods, but it tellingly overrode its initial decision to adopt a two-year/ten-year standard for 1933 Act violations in order to embrace the same one-year/three-year standard for the 1933 Act that it applied to the antifraud provisions of the 1934 Act, thus implementing a uniform standard for both Acts.

There are no other suitable alternatives. The 1933 and 1934 Acts contain only two other statutes of limitations. The two-year limitations period applicable to recoveries of profits on short-swing sales under § 16(b) of the 1934 Act has no discernible relationship to § 10(b) actions. The five-year limitations period of §20A of the 1934 Act, enacted as part of the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), is equally inappropriate. It is a narrow remedy created to respond to a limited insider trading problem. It was enacted five decades after § 10(b) and was not intended to apply generically to securities fraud. Neither the text of the ITSFEA nor its legislative history reflects any understanding or intention that its limitations period would apply to the broad range of § 10(b) cases. In fact, it was made expressly *inapplicable* to the right to bring any action "implied from a provision" of the 1934 Act. Applying the ITSFEA's five-year limitations period to § 10(b) actions would encourage claimants under §§ 11 and 12 of the 1933 Act and §§ 9, 18 and 29 of the 1934 Act to recharacterize their complaints as § 10(b) actions in order to take advantage of the longer limitations period, thus nullifying the careful congressional standard explicitly adopted to govern those provisions. "It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." *Blue Chip Stamps*, 421 U.S., at 736.

The one-year/three-year limitations period in the 1933 and 1934 Acts is the perfect standard for application to § 10(b) cases. It effectuates the federal policies behind

§ 10(b) and the federal securities laws generally and its application would alleviate a serious problem affecting the practicalities of § 10(b) litigation that does inestimable damage to litigants and to the courts.

ARGUMENT

I

CONGRESS ENACTED THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934 IN ORDER TO ESTABLISH A UNIFORM NATIONAL SYSTEM FOR THE REGULATION OF INTERSTATE COMMERCE IN SECURITIES

In response to the stock market crash of 1929, "Congress enacted two landmark statutes regulating securities." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975). The Securities Act of 1933, 15 U.S.C. §§ 77a, *et seq.*, generally regulates the initial distribution of securities in interstate commerce and was intended to promote orderly, efficient formation of capital, and to "provide investors with full disclosure of material information," thereby protecting them from fraud. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976).[4] The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.*, was also intended to bring stability and order to the securities markets, while at the same time protecting investors from "manipulation of stock prices" and other fraudulent practices "through regulation of transactions on

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[4] The history of the 1933 Act indicates that the purpose of that legislation was "to protect [both] the investing public and honest business." S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933), *reprinted in* 2 J. Ellenberger & E. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934* Item 17 (1973); 77 Cong. Rec. 2983 (May 8, 1933) (statement of Sen. Fletcher); *see also* 77 Cong. Rec. 937 (Mar. 29, 1933) (letter from President Roosevelt to Congress) ("The purpose of the legislation I suggest is to protect the public with the least possible interference to honest business").

securities exchanges and in over-the-counter markets." *Ernst & Ernst*, 425 U.S., at 195; *see also United States* v. *Naftalin*, 441 U.S. 768, 774-76 (1979) (discussing dual purposes of the securities acts).[5] Section 4 of the 1934 Act created the Securities and Exchange Commission ("Commission") to administer and enforce the federal securities laws. 15 U.S.C. § 78d. In addition to rulemaking and quasi-judicial authority, the Commission has "an arsenal of flexible enforcement powers." *Ernst & Ernst*, 425 U.S., at 195.

The 1933 and 1934 Acts responded to the inadequacy and inconsistency of state securities statutes[6] by establishing a comprehensive federal framework for the regulation of securities markets and transactions. These sweeping statutes reflected Congress' understanding that the health and integrity of securities markets were matters of national importance requiring uniform treatment through federal legislation. Indeed, in § 2 of the 1934 Act, *see* 15 U.S.C. § 78b, Congress explained that it was motivated by the conviction that "transactions in securities . . . are affected with a *national* public interest . . . ." (emphasis added).

The 1933 and 1934 Acts contain several express private remedies that permit individuals to sue for losses resulting from untruthful or misleading communications and manipulative, fraudulent and deceptive conduct in connection with securities transactions. For example, §§ 11 and 12(2)

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[5] As the House report pointed out, the 1934 Act was an attempt "to save, not destroy, stock markets and business, by making necessary changes in time." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 3 (1934), *reprinted in* 5 J. Ellenberger & E. Mahar, *supra* note 4, at Item 18.

[6] I L. Loss & J. Seligman, *Securities Regulation* 227-28 (3d ed. 1989). Prior to the enactment of the 1933 and 1934 Acts, securities transactions were governed only by state laws, which varied significantly from jurisdiction to jurisdiction. *Id.*

of the 1933 Act, 15 U.S.C. §§ 77k, 77*l*(2), permit actions for false or misleading statements or omissions in registration statements and prospectuses. Similarly, § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), creates a private right of action for false or misleading statements and manipulative conduct in connection with securities registered on a national exchange. Section 18(a) of the 1934 Act, 15 U.S.C. §78r(a), permits investors to sue for false or misleading statements "in any application, report, or document" filed with the Commission. And § 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b), was amended in 1938 to permit private actions to void certain purchase or sale contracts that violate the statute or rules promulgated thereunder.[7]

When Congress created these express private rights of action for the victims of fraudulent practices, it engaged in extensive debate and deliberation regarding the appropriate corresponding statutes of limitations.[8] The 1934 Act made claims under §§ 11 and 12 of the 1933 Act and §§ 9 and 18 of the 1934 Act all subject to the same limitations period: one year from discovery of the facts constituting the violation and in no event more than three years after the violation (or transaction) occurred.[9]

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[7] Another private right of action is expressly authorized by § 16(b) of the 1934 Act, 15 U.S.C. § 78p(b), which allows a shareholder to recover, on behalf of the corporation, "short-swing profits," *i.e.*, the profits made by certain insiders who have purchased and sold shares within a six-month period. In the 1988 ITSFEA legislation, Congress amended the 1934 Act to add § 20A, 15 U.S.C. § 78t-1, to create a remedy in favor of "contemporaneous traders" against persons who violate other provisions of the securities laws by trading while in possession of material, nonpublic information.

[8] *See infra* pages 37-41.

[9] As will be discussed in greater detail, *infra*, most claims under §§ 11 and 12 of the 1933 Act were originally required to be filed within two years from discovery of the untrue statement but no later than ten years after the security was offered to the public. When it passed the 1934 Act, Congress reconsidered the two-year/ten-year provision

The principal additional provision of the securities laws that addresses fraudulent and deceptive conduct is § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b).[10] Section 10(b) makes it "unlawful" to

> use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). As this Court has recognized, § 10(b) was "described rightly" by its drafters "as a 'catchall clause to enable the Commission to deal with new manipulative [or cunning] devices.' " *Ernst & Ernst*, 425 U.S., at 203 (citation omitted).

Pursuant to the statutory authority conferred by § 10(b), the Commission in 1942 promulgated Rule 10b-5, 17 C.F.R. § 240.10b-5. It broadly prohibits fraudulent schemes and material misstatements or omissions in connection with the purchase or sale of securities.[11]

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and established a uniform one-year/three-year limitations period for private actions under the antifraud provisions of both the 1933 and 1934 Acts. In 1938, a one-year/three-year statute of limitations was adopted for § 29(b) of the 1934 Act. *See* 1934 Act, § 29(b), 15 U.S.C. § 78cc(b).

The only deviations from the one-year/three-year rule are a two-year statute of limitations contained in § 16 on actions to recover short-swing profits and a five-year limitations period in § 20A relating to actions by contemporaneous traders under the ITSFEA.

[10] *See also* 1933 Act, § 17, 15 U.S.C. § 77q; 1934 Act, § 14(e), 15 U.S.C. § 78n(e).

[11] Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Neither § 10(b) nor Rule 10b-5 explicitly established a private right of action. However, to complement the "numerous carefully drawn express civil remedies" of the two securities acts, *Blue Chip Stamps*, 421 U.S., at 730, the courts inferred a private remedy under § 10(b) and Rule 10b-5. *See, e.g., Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946). This Court subsequently confirmed the existence of such an implied right of action. *See, e.g., Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983).

Because Congress had not expressly created a private right of action for § 10(b) violations, it did not expressly enact any limitations period applicable to such actions. Until recently, the federal courts have uniformly applied varying state statutes of limitations to § 10(b) claims, rather than a limitations period drawn from § 10(b)'s express counterparts in the 1933 and 1934 Acts. *Ernst & Ernst*, 425 U.S., at 210 n.29.

II

SECTION 10(b) CLAIMS SHOULD BE SUBJECT TO A UNIFORM FEDERAL STATUTE OF LIMITATIONS

A. Standards for Choosing a Limitations Period for a Federal Right of Action.

This Court has long recognized that statutes of limitations are "vital to the welfare of society and are favored

in the law," because "they promote repose by giving security and stability to human affairs." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879); *see also McCluney* v. *Silliman*, 3 Pet. (28 U.S.) 269, 277 (1830) (limitations periods "tend to the peace and welfare of society"). Statutes of limitations are intended to promote "fairness to defendants" and to preclude litigation of "stale claims." *Burnett* v. *New York Central Railway Co.*, 380 U.S. 424, 428 (1965).[12]

However, not all federal rights of action are governed by an explicit federal statute of limitations. In creating express private rights of action, Congress sometimes is silent with respect to the appropriate limitations period, *see, e.g., Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 146 (1987), or, as is the case here, the courts sometimes infer private rights of action from federal statutes that do not expressly provide for a private remedy and therefore do not necessarily include a limitations period. In such situations, the Court has "borrowed"[13] a statute of limitations "from some other source," *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983), rather than impose no limitations period at all. *Agency Holding Corp.*, 483 U.S., at 156; *see also Wilson*, 471 U.S., at 271 (a "federal cause

[12] *See also Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) (limitations periods "inevitably reflect[] a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"). As the Court has observed, "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson* v. *Garcia*, 471 U.S. 261, 271 (1985).

[13] Various labels have been used to describe the practice of selecting state statutes of limitations to apply to federal claims. The term "borrowing" may not be accepted universally as an apt characterization of the practice. *See Agency Holding Corp.*, 483 U.S., at 158 (Scalia, J., concurring in the judgment). The practice also has been referred to as "absorption" of state law. *See, e.g., Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946).

of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws' ") (quoting *Adams* v. *Woods*, 2 Cranch (6 U.S.) 336, 341 (1805)).[14]

Although historically "courts have generally looked to [state] law as the source" of limitations periods for federal remedies when federal law is silent on the question, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 557 (1974), in 1983 in *DelCostello* and four years later in *Agency Holding Corp.* the Court examined the standards for choosing an appropriate limitations period and categorically rejected the suggestion that "federal courts always should apply the state statute of limitations most analogous to each individual case whenever a federal statute is silent on the proper limitations period." *Agency Holding Corp.*, 483 U.S., at 146; *see also Reed* v. *United Transportation Union*, 109 S. Ct. 621 (1989). Neither the Rules of Decision Act, 28 U.S.C. 1652,[15] nor any other aspect of federal law *requires* reference to state law, *DelCostello*, 462 U.S., at 159 n.13, and "[i]n some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law," *id.*, at 161.

Indeed, "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the

[14] *But see Holmberg*, 327 U.S., at 395 (declining to apply any statute of limitations to federal equitable claims, instead invoking laches doctrine).

[15] The Rules of Decision Act provides that state law shall be regarded as providing the rules of decision when federal law does not "otherwise require or provide." 28 U.S.C. § 1652. The Court in *DelCostello* concluded that the "choice of a limitations period for a federal cause of action is itself a question of federal law. If the answer to that question . . . is that a timeliness rule drawn from elsewhere in federal law should be applied, then the Rules of Decision Act is inapplicable by its own terms." 462 U.S., at 159 n.13; *see also id.*, at 174 n.1 (O'Connor, J., dissenting) (the Rules of Decision Act "only puts the question, for it simply requires application of state law unless federal law applies"); *cf. Agency Holding Corp.*, 483 U.S., at 162 (Scalia, J., concurring in the judgment).

duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 367 (1977) (EEOC civil rights enforcement actions are subject only to time limitations expressly contained in Title VII and federal equitable principles); *see also McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 224-26 (1958) (applying federal limitations period to judicially created maritime rights); *Holmberg*, 327 U.S., at 395 (federal principles of laches, rather than state limitations periods, apply to enforce federal equitable rights).

The Court's decisions in *DelCostello* and *Agency Holding Corp.*, which rejected state limitations periods in favor of federal analogs, identified several factors that should be considered in selecting the most appropriate statute of limitations for an implied federal right of action. One factor is whether all claims arising out of the federal statute " 'should be characterized in the same way' " for statute of limitations purposes, " 'or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.' " *Agency Holding Corp.*, 483 U.S., at 147 (quoting *Wilson v. Garcia*, 471 U.S., at 268). If so, "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Id.*, at 150 (quoting *Wilson*, 471 U.S., at 272). In addition, it must be determined whether a rule from elsewhere in federal law provides a closer analogy than available state statutes, and, if so, whether the " 'federal policies at stake and the practicalities of litigation" make that federal rule "a significantly more appropriate vehicle for interstitial lawmaking . . . .' " *Id.*, at 148 (quoting *DelCostello*, 462 U.S., at 172).

The Court in *DelCostello* also declared that "it makes more sense" to assume that Congress intended application of a state limitations period "to a cause of action expressly created by Congress than . . . to one found by the courts

to be implied in a general statutory scheme—especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief." 462 U.S., at 159 n.12. If Congress created an express right, but did not adopt an express limitations period for that right, it might be assumed that Congress intended that courts implementing that right follow the practice of turning to state law. The same cannot be said when the right itself is implied from a federal statute and was not expressly created by Congress. Thus, although the Court did not reach the question in *DelCostello*, it seemed to embrace the logic that there is considerably less justification for resorting to state limitations periods when an implied right of action is involved and the federal statutory scheme includes an express limitations period for comparable remedies.[16]

B. The Prevailing Practice of Borrowing State Statutes of Limitations for § 10(b) Claims Has Resulted in Inconsistency, Unpredictability, Delay, Heightened Expense and Forum Shopping—Frustrating the Policies Underlying the Securities Acts.

1. The Federal Courts Currently Apply a Multitude of Widely Varying and Poorly Suited State Limitations Periods to § 10(b) Claims.

Section 10(b) claims are litigated exclusively in federal courts. 1934 Act, § 27, 15 U.S.C. § 78aa. Nonetheless, the

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[16] *See also United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring in the judgment) ("the fact that Congress did not provide a limitations period for a judicially enforceable action later found implied in the NLRA is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute . . . . [I]t cannot reasonably be assumed . . . that congressional silence reflects an intent to apply state statutes of limitation for an action based in part on rights and obligations traceable to the NLRA."); *McAllister*, 357 U.S., at 228-29 (Brennan, J., concurring).

first courts to consider what limitations period to apply to § 10(b) claims borrowed the most analogous law of the forum State, *see Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783, 787 (2d Cir. 1951); *Osborne* v. *Mallory*, 86 F. Supp. 869, 879 (S.D.N.Y. 1949), establishing a practice that persisted for more than 40 years.[17] Different federal courts implemented the process differently. Even respondents candidly acknowledged in opposition to the petition that the result was at least "fifty different rules creating differences within and between circuits." Respondents' Opp. to Pet. for Cert., at 2. That figure, however, understates the magnitude of the problem.

The confusion that has resulted from applying varying state statutes of limitations to § 10(b) claims stems in part from the fact that such claims " 'encompass numerous and diverse topics and subtopics,' " *Agency Holding Corp.*, 483 U.S., at 146 (discussing civil RICO claims) (citation omitted), and, accordingly, "embrace a galaxy of actions," *In re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1543 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988). Section 10(b) claims "can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance.' " *Herman & MacLean*, 459 U.S., at 382 (emphasis in original) (quoting § 10(b)). A private party can bring a § 10(b) claim against, *inter alia*, persons who engage in manipulation of securities prices,[18] an issuer of securities who makes false or misleading statements,[19] lawyers and

[17] In *Ernst & Ernst*, 425 U.S., at 196 & n.2, and *Herman & MacLean*, 459 U.S., at 384 n.18, this Court took note of the fact that the lower courts looked to state law for a limitations period under § 10(b). The propriety of that practice was not a question presented in either case.

[18] *See Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 303 (1985); McLucas & Angotti, *Market Manipulation*, 22 Sec. & Commodities Reg. 103 (1989).

[19] *See Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988).

accountants who participate in securities offerings,[20] broker-dealers who commit fraud,[21] and certain fiduciaries who trade in the securities markets on the basis of material, nonpublic information.[22] Consequently, § 10(b) and Rule 10b-5 "may well be the most litigated provisions in the federal securities laws." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465 (1969).

In searching for a suitable state law analog for § 10(b) cases, some courts, like the Ninth Circuit, have turned to the state statutes of limitations for common law fraud, while others have looked to state "blue sky" statutes regulating securities,[23] general personal injury statutes[24] and "catch-all" limitations periods.[25] Section 10(b) claims also could theoretically be compared to breach of contract claims, a variety of business torts, and breach of fiduciary duty actions.

However, no single state law right of action provides a satisfactory analog for § 10(b) claims even within one State. This Court has often rejected the contention that § 10(b) claims are analogous to common law claims for fraud and deceit: "[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable." *Blue Chip Stamps*, 421 U.S., at 744-45; *accord Basic, Inc.* v. *Levinson*, 485 U.S. at 243-44 ("The modern securities markets, literally involving mil-

[20] *See Herman & MacLean*, 459 U.S., at 378.

[21] *See Bateman Eichler, Hill Richards, Inc.*, 472 U.S., at 301-03.

[22] *See Dirks* v. *SEC*, 463 U.S. 646, 653-54, 660-64 (1983).

[23] *See, e.g., Smith* v. *Duff & Phelps, Inc.*, 891 F.2d 1567 (11th Cir. 1990).

[24] *See, e.g., Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1st Cir. 1987).

[25] *See, e.g., Cunha* v. *Ward Foods, Inc.*, 501 F. Supp. 830, 837 (D. Haw. 1980).

lions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases.").

In fact, Rule 10b-5 was promulgated in order to "rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Herman & MacLean*, 459 U.S., at 389. Accordingly, § 10(b) claims differ from typical common law fraud claims in many important respects. *See Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153-54 (1972) (reliance presumed in § 10(b) cases involving material omissions); *Herman & MacLean*, 459 U.S., at 390 (§ 10(b) claims, unlike actions for common law fraud, need not be proved by clear and convincing evidence); *Basic, Inc.*, 485 U.S., at 247 (discussing "fraud-on-the-market" theory and creating rebuttable presumption of reliance on public material misrepresentation in § 10(b) cases). For all these reasons, "[i]t is therefore clear that, far from being a mirror image or a reasonable facsimile of common law fraud, actions brought under section 10(b) and Rule 10b-5 appear to be *sui generis*." *Data Access*, 843 F.2d, at 1545.

State blue sky statutes also provide an unsatisfactory analogy to § 10(b). Blue sky statutes come in many forms, some of which bear little resemblance to § 10(b). *See generally* L. Loss, *Fundamentals of Securities Regulation* 877-78 (2d ed. 1988). In contrast to § 10(b), some blue sky laws may not impose any scienter or reliance requirements, *see Wood* v. *Combustion Engineering*, 643 F.2d 339, 345-46 (5th Cir. 1981), or may not permit sellers of securities, as opposed to purchasers, to sue for fraud, *see Data Access*, 843 F.2d, at 1544. Blue sky laws also may limit relief to rescission damages and preclude actions against "the attorneys and accountants of a corporate seller of securities." *See id.*[26]

[26] Other common claims under § 10(b) may be precluded as a matter of law under the state securities acts. *See, e.g. Nesbit* v. *McNeil*, 896 F.2d 380, 387 (9th Cir. 1990) (Oregon's blue sky statute does not provide a remedy for claims arising from a principal-agent transaction such as relationships between broker-dealers and their clients); *Biggans* v. *Bache Halsey Stuart Shields, Inc.*, 638 F.2d 605 (3d Cir. 1980) (Pennsylvania's blue sky statute does not recognize so-called "churning" claims in which a broker-dealer generates excessive and improper commissions).

Judge Easterbrook has described the difficulties and judicial costs in attempting to match state law to § 10(b) claims:

> Deciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours. *Never has the process been more enervating than in securities law.* There are many potentially analogous state statutes, with variations for different kinds of securities offenses and different circumstances that might toll the period of limitations. Both the bar and scholars have found the subject vexing and have pleaded, with a unanimity rare in the law, for help.

Norris v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir.) (emphasis added) (citations omitted), *cert. denied*, 484 U.S. 943 (1987); *see also Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990) ("Lawyers and courts alike devote untold hours to identifying proper state analogies."), *cert. pending* (No. 90-526); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1504 (11th Cir. 1986) (rejecting case-by-case selection of analogy); *Roberts* v. *Magnetic Metals Co.*, 611 F.2d 450, 461 (3d Cir. 1979) (Seitz, J., dissenting) (discussing confusion and difficulties of matching § 10(b) claims to state law actions and observing that precedent is of little value in conducting such an inquiry).

The lengths of the limitations periods borrowed from state law by the federal courts have varied radically from

one jurisdiction to another, ranging from one year in Maryland, *see, e.g., O'Hara* v. *Kovens*, 625 F.2d 15, 18 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981), to ten years in one court, *see Denny* v. *Performance Systems, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 93,387, at 91,981 (M.D. Tenn. Nov. 5, 1971).[27] Currently, federal courts in fourteen States, the District of Columbia, and Puerto Rico apply a two-year statute of limitations.[28] Nine States apply limitations pe-

[27] The ten-year Tennessee fraud limitations period borrowed in *Denny* has since been shortened to three years by amendment. *See Media General, Inc.* v. *Tanner*, 625 F. Supp. 237, 245-47 (E.D. Tenn. 1988).

[28] These jurisdictions are Alabama, the District of Columbia, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, Puerto Rico, and Virginia. *See, e.g., Smith* v. *Duff & Phelps, Inc.*, 891 F.2d 1567, 1570 (11th Cir. 1990) (Alabama blue sky law); *Forrestal Village, Inc.* v. *Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977) (District of Columbia blue sky law); *Nortek, Inc.* v. *Alexander Grant & Co.*, 532 F.2d 1013, 1015 (5th Cir. 1976) (Florida blue sky law), *cert. denied*, 429 U.S. 1042 (1977); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1507 (11th Cir. 1986) (Georgia Securities Act); *In re Alodex Corp. Sec. Litig.*, 533 F.2d 372, 374 (8th Cir. 1976) (Iowa blue sky law); *Woods* v. *Homes & Structures of Pittsburgh, Kan., Inc.*, 489 F. Supp. 1270, 1284 (D. Kan. 1980) (Kansas fraud); *Davis* v. *A.G. Edwards & Sons, Inc.*, 635 F. Supp. 707, 715 (W.D. La. 1986) (Louisiana blue sky law), *modified*, 823 F.2d 105 (5th Cir. 1987); *Dyer* v. *Eastern Trust & Banking Co.*, 336 F. Supp. 890, 906 (D. Me. 1971) (Maine blue sky law); *Stewart* v. *Germany*, 631 F. Supp. 236, 247 (S.D. Miss. 1986) (Mississippi blue sky law); *Harris* v. *Union Elec. Co.*, 787 F.2d 355, 360 (8th Cir.) (Missouri blue sky law), *cert. denied*, 479 U.S. 823 (1986); *Volk* v. *D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (Montana fraud); *Umstead* v. *Durham Hosiery Mills, Inc.*, 578 F. Supp. 342, 347 (M.D.N.C. 1984) (North Carolina blue sky law); *Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust* v. *Octagon Properties, Ltd.*, 740 F. Supp. 1553, 1567 (W.D. Okl. 1989) (Oklahoma fraud); *Williams* v. *Sinclair*, 529 F.2d 1383, 1387 (9th Cir. 1975) (Oregon fraud); *Rodriguez* v. *Banco Central*, 727 F. Supp. 759, 767 (D. P.R. 1989) (Puerto Rico blue sky law); *Land* v. *Dean Witter Reynolds, Inc.*, 617 F. Supp. 52, 53 (E.D. Va. 1985) (Virginia blue sky law).

Although no Alaska federal court has addressed this issue, a two-

riods of three years.[29] Federal courts in two States set their limitations periods at four years;[30] courts in two other States have used five years;[31] and four jurisdictions currently apply six-year statutes of limitations.[32]

year limitations period has been applied to a § 10(b) action arising in that State. *See Robertson* v. *Seidman & Seidman*, 609 F.2d 583, 586 (2d Cir. 1979) (applying Alaska personal injury limitations period).

[29] These States are Arizona, California, Colorado, Kentucky, Minnesota, South Carolina, Utah, Washington and West Virginia. *See, e.g., Semegen* v. *Weidner*, 780 F.2d 727, 733 (9th Cir. 1985) (Arizona fraud); *Davis* v. *Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1369-70 (9th Cir. 1988) (California fraud); *deHaas* v. *Empire Petroleum Co.*, 435 F.2d 1223, 1225 (10th Cir. 1970) (Colorado fraud); *Carothers* v. *Rice*, 633 F.2d 7, 15 (6th Cir. 1980) (Kentucky blue sky law), *cert. denied*, 450 U.S. 998 (1981); *In re Professional Fin. Management, Ltd.*, 703 F. Supp. 1388, 1392-93 (D. Minn. 1989) (Minnesota blue sky law); *Mid-Carolina Oil, Inc.* v. *Klippel*, 526 F. Supp. 694, 696-97 (D.S.C. 1981) (South Carolina blue sky law), *aff'd*, 673 F.2d 1313 (3d Cir.), *cert. denied*, 457 U.S. 1107 (1982); *Loveridge* v. *Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1982) (Utah fraud); *Reeves* v. *Teuscher*, 881 F.2d 1495, 1500 (9th Cir. 1989) (Washington fraud); *Estate of Dearing* v. *Dearing*, 646 F. Supp. 903, 906-07 (S.D. W. Va. 1986) (West Virginia blue sky law).

[30] These States are Ohio and Texas. *See Marx* v. *Centran Corp.*, 747 F.2d 1536, 1551 (6th Cir. 1984) (Ohio fraud), *cert. denied*, 471 U.S. 1125 (1985); *Sioux, Ltd., Sec. Litig.* v. *Coopers & Lybrand*, 914 F.2d 61, 63 (5th Cir. 1990) (Texas fraud).

[31] These States are Arkansas and Massachusetts. *See, e.g., Pinney* v. *Edward D. Jones & Co., Inc.*, 718 F. Supp. 1419, 1421 (W.D. Ark. 1989) (Arkansas blue sky law); *Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123, 124 & n.2 (1st Cir. 1987) (Massachusetts personal tort). *But see Robertson* v. *Deloitte, Haskins & Sells*, 732 F. Supp. 979, 985 (E.D. Ark. 1990) (applying federal one-year/three-year limitations provision); *In re Atlantic Fin. Management, Inc. Sec. Lit.*, 718 F. Supp. 1003, 1009 (D. Mass. 1988) (borrowing Massachusetts two-year blue sky law).

[32] Hawaii, Michigan, New Hampshire and South Dakota use six years. *See, e.g., Cunha* v. *Ward Foods, Inc.*, 501 F. Supp. 830, 837 (D. Haw. 1980) (Hawaii "catch-all" limitations statute); *IDS Progressive Fund, Inc.* v. *First of Michigan Corp.*, 533 F.2d 340, 344 (6th Cir. 1976) (Michigan fraud); *Seidel* v. *Public Serv. Co. of New Hampshire*, 616 F. Supp. 1342, 1358 n.24 (N.D.N.H. 1985) (New Hampshire fraud); *Rude*

In several States it simply is not clear which limitations period applies.[33] For example, the Eastern District of Tennessee uses a one-year/two-year limitations provision, while the Western District of that State employs a single three-year period. *Compare Montcastle* v. *American Health Systems, Inc.*, 702 F. Supp. 1369, 1372 (E.D. Tenn. 1988) (applying one year from discovery/two years from transaction statute of limitations from Tennessee blue sky law) *with Media General, Inc.* v. *Tanner*, 625 F. Supp. 237, 245-47 (W.D. Tenn. 1985) (applying three-year statute of limitations for common law fraud). In the Middle District of Tennessee, the limitations period seems to depend on which judge is assigned to the case. *Compare Nichols* v. *Merrill Lynch, Pierce, Fenner & Smith*, 706 F. Supp. 1309, 1320-21 (M.D. Tenn. 1989) (Higgins, J.) (applying three-year fraud statute of limitations) *with Logan* v. *Ledford*, 699 F. Supp. 141, 144 (M.D. Tenn. 1988) (Wiseman, C.J.) (applying one year from discovery/two years from transaction blue sky statute of limitations).

Federal courts in some States have applied one limitations period for a while and then borrowed a different

v. *Campbell Square, Inc.*, 411 F. Supp. 1040, 1048 (D.S.D. 1976) (South Dakota fraud).

[33] No federal court has addressed the applicable limitations period for § 10(b) claims brought in Idaho, Nebraska, Nevada, or North Dakota. In New Mexico, Rhode Island and Wyoming, cases do not resolve which limitations period is appropriate. *See Stone* v. *Fossil Oil & Gas*, 657 F. Supp. 1449, 1458 (D.N.M. 1987) (referring to New Mexico limitations periods for both state securities act and common law fraud violations, but not finding it necessary for holding to determine which period was applicable); *Holmes* v. *Bateson*, 583 F.2d 542, 559-60 (1st Cir. 1978) (mentioning both three-year limitations period for personal injuries and six-year limitation period for fraud, but declining to decide which was applicable to Rhode Island action); *Bath* v. *Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 818-19 (10th Cir. 1990) (reversing District Court's decision to borrow one-year/three-year limitations provision from federal securities law, remanding "for further proceedings under the most analogous state law limitations period," but not specifying which Wyoming limitations period was most analogous).

period because of changes in state law. For example, until recently courts in the Fifth Circuit applied a two-year limitations period to § 10(b) claims arising in Texas under the assumption that Texas had a two-year statute of limitations for fraud. *See, e.g., Wood* v. *Combustion Engineering, Inc.*, 643 F.2d 339, 346 (5th Cir. 1981). In March 1990, the Texas Supreme Court held that a 1979 statutory amendment had extended the limitations period for fraud to four years and that courts had been applying the incorrect limitations period for the past eleven years. *See Williams* v. *Khalaf*, No. C-8467 (Tex. Mar. 28, 1990). In response to *Williams*, the Fifth Circuit promptly reversed itself and applied a four-year limitations period to a § 10(b) claim arising in Texas. *See Sioux, Ltd., Securities Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 63 (5th Cir. 1990).

In some cases, a federal court will borrow the law of the forum; in others a federal court will apply state choice of law principles to borrow the law of another jurisdiction. *See Ceres Partners* v. *GEL Associates*, No. 89-7666 (2d Cir. Nov. 8, 1990), slip op., at 6-7.

Finally, the confusion is aggravated by application of amorphous and conflicting principles of equitable tolling to determine when state limitations periods begin to run. The federal courts have "grappled at length with the interaction between state and federal tolling rules," *Short*, 908 F.2d, at 1389, and there is disagreement with respect to important facets of the federal equitable tolling doctrine.[34]

[34] In this case, the court below looked to the federal doctrine of equitable tolling to determine when the Oregon limitations period began to run. Pet. App. 12a-13a. Under the Ninth Circuit's equitable tolling rule, the limitations period "starts upon 'actual or inquiry notice that a fraudulent misrepresentation has been made,' " Pet. App. 13a (quoting *Volk* v. *D.A. Davidson Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987)), and inquiry notice, which "arises when plaintiff could discover the fraud through the exercise of reasonable diligence," is tested by an " 'ob-

2. The Practice of Borrowing State Limitations Periods Has Had Pernicious Effects on § 10(b) Litigation.

The practice of applying state limitations periods to § 10(b) claims has been damaging to litigants and to the civil justice system and has undermined the effectiveness and value of §10(b) as a remedy. For example, forum shopping is inevitable and common in § 10(b) cases. *See* Respondents' Opp. to Pet. for Cert., at 4 ("There is undoubtedly forum shopping where a 10b-5 action may be brought in more than one state and the statutes of limitations differ."). Section 10(b) claims must be predicated upon conduct with a nexus to interstate commerce, and acts that typically form the basis of a complaint occur in several States. *See Ceres Partners*, slip op., at 28 ("It is hardly uncommon for a single lawsuit to encompass the claims of plaintiffs from a large number of states."); *cf. Agency Holding Corp.*, 483 U.S., at 154 (given the "multistate nature of RICO," the "use of state statutes would present the danger of forum shopping"). Indeed, the case at bar, which did not even arise out of a transaction on a national exchange, involves parties and conduct in Oregon, New York, New Jersey, Illinois, North Carolina, Pennsylvania, Texas, Delaware, Minnesota, and Connecticut.

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jective standard.' " Pet. App. 13a (citation omitted). Other courts appear to consider subjective factors in applying the "reasonable diligence" test. *See, e.g., Ohio* v. *Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402, 408 (D. Colo. 1979) ("the court gives some weight to the . . . legal sophistication of the party involved"), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). The lower federal courts also appear to disagree on the issue whether a defendant's active concealment of a fraud relieves a plaintiff of the duty of diligent investigation. *See* ABA Committee on Federal Regulations of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 655 (1986) ("ABA Report"). "The federal equitable tolling doctrine, therefore, greatly compounds the complexity of the law of limitations in implied actions for securities fraud." *Id.*

The 1934 Act's liberal venue provisions give plaintiffs wide latitude in choosing a forum.[35] A plaintiff who has unduly delayed filing a claim can almost invariably find a jurisdiction with a generous statute of limitations that will permit prosecution.

The combination of different potential limitations periods and multistate transactions has led to truly incomprehensible results. For example, in class actions, district courts have applied different limitations periods in the same case. *See, e.g., Kronfeld* v. *Advest, Inc.*, 675 F. Supp. 1449, 1457-58 & n.21 (S.D.N.Y. 1987) (applying 26 different statutes of limitations in § 10(b) class action); *In re National Student Marketing Litigation*, Fed. Sec. L. Rep (CCH) ¶ 97,926 (D.D.C. March 26, 1981) (noting the possible applicability of 34 different statutes of limitations to § 10(b) claims).

Under the current system, a lawyer sued in New Hampshire is subject to a six-year statute of limitations. *See Seidel* v. *Public Service Co. of New Hampshire*, 616 F. Supp. 1342, 1358 n.24 (D.N.H. 1985). A lawyer who performed identical functions in the same place, but who is sued in Texas, would be subject to a four-year statute of limitations. *See Longden* v. *Sunderman*, 737 F. Supp. 968, 971-72 (N.D. Tex. 1990). If state law is borrowed for § 10(b) claims, the same lawyer sued in federal court in New York by New York and New Jersey residents might be subject to *different* limitations periods for each plaintiff because New York would borrow New Jersey law for the New Jersey plaintiff but not for the plaintiff from New York. *See Ceres Partners*, slip op. at 9-10. There is no rational way to justify such disparities. Duties, rights and remedies under the national securities laws should not vary from

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[35] Section 27, 15 U.S.C. § 78aa, provides that suit may be brought to enforce the 1934 Act in "the district wherein any act or transaction constituting the violation occurred," or "in the district wherein the defendant is found or is an inhabitant or transacts business . . . ."

case to case or from plaintiff to plaintiff. The judicial resources dissipated on the resolution of complex and arcane statute of limitations issues constitute a drain on litigants and the courts alike.

The lack of cohesion among the jurisdictions necessarily frustrates private enforcement of § 10(b), distorting both the compensatory and deterrent functions of the statute. As this Court has recognized in another context:

> Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute [of limitations]. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

Wilson v. *Garcia*, 471 U.S., at 275 (discussing limitations period for civil rights claims under 42 U.S.C. § 1983); *see also Agency Holding Corp.*, 483 U.S., at 150. To the extent that plaintiffs must speculate regarding the applicable limitations period, problems of underdeterrence are created, and the goal of investor protection is thereby undermined. At the same time, the current system's unpredictability precludes defendants from making rational judgments about their exposure to § 10(b) litigation, leading to overdeterrence and market inefficiency.

The courts and commentators have reacted to the current state of affairs "with a unanimity unmatched in any other corner of securities law." *Short*, 908 F.2d, at 1389. The practice of applying state limitations periods to § 10(b) claims has been referred to as a "nightmare," *id.*, a "tottering parapet of a ramshackle edifice," *Norris* v. *Wirtz*, 818 F.2d, at 1332, and a "judicial travesty . . . replete with evidence of sloppy scholarship, the willingness of courts to accept dicta without analysis, and the remarkable inefficiency of the federal judicial system in resolving disputed issues of federal law," Bloomenthal, *The Statute of*

Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude, 60 U. Colo. L. Rev. 235, 236 (1989).[36] In 1986, an American Bar Association special task force surveyed the state of the law and found "uncertainty," "inconsistency," "confusion" and "disarray." ABA Report, *supra* note 34, at 647, 648.

The ABA Report concluded:

> Such disarray serves no public purpose. This uncertainty and lack of uniformity promote forum shopping by plaintiffs and result in wholly unjustified disparities in the rights of parties litigating identical claims in different states. Neither plaintiffs nor defendants can determine their rights with any certainty.

Id., at 647 (footnotes omitted).

Although individual judges had begun to suggest that the existing practice was irrational and legally questionable,[37] the courts continued to apply state limitations pe-

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[36] *See also* Garrett, *The Ramshackle Edifice: Limitations Periods for Private Actions Under Rule 10b-5*, 28 Duq. L. Rev. 1 (1989); L. Loss, *Fundamentals of Securities Regulation*, 994-95 (1988); Block & Barton, *Statute of Limitations in Private Actions Under Section 10(b)—A Proposal for Achieving Uniformity*, 7 Sec. Reg. L.J. 374 (1980); Bromberg, *Curing Securities Violations: Rescission Offers and Other Techniques*, 1 J. Corp. L. 1, 9-10 (1975); Martin, *Statutes of Limitations and 10b-5 Actions; Which State Statute is Applicable?*, 29 Bus. Law. 443, 455 n.91 (1974); Ruder & Cross, *Limitations on Civil Liability Under Rule 10b-5*, 1972 Duke L.J. 1125; Schulman, *Statutes of Limitation in 10b-5 Actions: Complication Added to Confusion*, 13 Wayne L. Rev. 635 (1967).

[37] *See, e.g.*, *Roberts* v. *Magnetic Metals Co.*, 611 F.2d 450, 463 (3d Cir. 1979) (Seitz, J., dissenting) (noting that commentators had urged that a uniform federal limitations period be adopted and stating that "[w]ere I writing on a clean slate, I would be inclined to adopt that approach."); *Norris*, 818 F.2d, at 1332; *Davis* v. *Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1370 (9th Cir. 1988) (Aldisert, J., concurring) (sitting by designation) (urging adoption of uniform federal limitations period).

riods to § 10(b) cases until 1988. In that year, following the guidance of this Court's decisions in *DelCostello* and *Agency Holding Corp.*, the Courts of Appeals began the process of repudiating the logic and legality of borrowing state limitations periods in § 10(b) cases. In *In Re Data Access Systems Securities Litigation*, 843 F.2d 1537, 1550 (3d Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988), the Third Circuit held that § 10(b) claims should be governed by a uniform federal statute of limitations—the one-year/three-year period contained in most of the express remedy provisions of the federal securities laws. The Second and Seventh Circuits have now reached the same conclusion. *See Ceres Partners* v. *GEL Associates*, No. 89-7666 (2d Cir. Nov. 8, 1990); *Short* v. *Belleville Shoe Manufacturing Co.*, 908 F.2d 1385, 1389 (7th Cir. 1990), *cert. pending* (No. 90-526).[38] As the following discussion will demonstrate, these three Courts of Appeals are correct.

C. The Federal Securities Laws Contain Explicit Remedial Provisions Far More Analogous to § 10(b) Claims Than Any State Law Alternative.

1. The One-Year/Three-Year Limitations Period Should Be Applied to § 10(b) Claims.

Section 10(b) is one of several closely related provisions that the Seventy-Third Congress included in the original securities acts with the common purpose of compelling full and truthful disclosure in securities transactions. Indeed, §§ 11 and 12 of the 1933 Act, 15 U.S.C. §§ 77k, 77*l*, and §§ 9 and 18 of the 1934 Act, 15 U.S.C. §§ 78i, 78r, were enacted by the same Congress and for the same purpose as § 10(b), and every one of these "comparable express

[38] Some federal district courts in other circuits also have applied the one-year/three-year limitations rule to § 10(b) claims. *See, e.g., Robertson* v. *Deloitte, Haskins & Sells*, 732 F. Supp. 979 (E.D. Ark. 1990).

causes of action"[39] is governed by an identical limitations period that requires commencement of a private action within one year of the discovery of the facts constituting the violation *and* within three years of the date of the violation.[40] Section 29 of the 1934 Act, amended in 1938 to permit private suits to void certain contracts, is governed by the same limitations period.[41] These sections supply a "far closer analogy"[42] to § 10(b) than any state law alternative.

There is a "substantial overlap" and "family resemblance," *DelCostello*, 462 U.S., at 170, between the express remedies of the 1933 and 1934 Acts and § 10(b). As noted earlier, §§ 11 and 12 of the 1933 Act created private remedies for false and misleading statements in connection with initial distributions of securities. Sections 9 and 18 of the 1934 Act permit private actions for similar conduct that occurs in post-issuance trading. Section 10(b) of the 1934 Act is a broad "catch-all" prohibition against all other, or new forms of "manipulative and deceptive device[s] or contrivance[s]" that was intended to give the Commission the power and flexibility to regulate new fraudulent practices not specifically identified or defined in the 1933 and 1934 Acts. *See Ernst & Ernst*, 425 U.S., at 204-05.

[39] *Blue Chip Stamps*, 421 U.S., at 736.

[40] *See* 1933 Act, § 13, 15 U.S.C. § 77m (creating one-year/three-year limitations period for private actions under §§ 11 and 12); 1934 Act, § 9(e), 15 U.S.C. § 78i(e) (precluding private actions unless "brought within one year after discovery of the facts constituting the violation and within three years after such violation"); 1934 Act, § 18(c), 15 U.S.C. § 78r(c) (precluding private actions "unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued").

[41] *See* 1934 Act, § 29(b), 15 U.S.C. § 78cc(b) (precluding actions unless "brought within one year after the discovery that [a] sale or purchase involve[d] . . . [a] violation and within three years after such violation").

[42] *Agency Holding*, 483 U.S., at 156.

The closest analog for § 10(b) is the section that immediately precedes it in the 1934 Act. Section 9, 15 U.S.C. § 78i, has been characterized as "the very heart of the act."[43] It proscribes a variety of specifically identified deceptive, manipulative or misleading practices and creates a private right of action for willful participation in any of those practices. For example, an investor may bring an action under § 9(a)(4) against certain persons who make

> any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact.

15 U.S.C. § 78i(a)(4). Rule 10b-5 uses almost identical language in creating, by inference, a right of action against someone who communicates

> any untrue statement of a material fact or . . . omit[s] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

17 C.F.R. § 240.10b-5(b).

As the Second Circuit concluded in *Ceres Partners*, a suit predicated upon the conduct described in § 9 "could as easily be brought under Rule 10b-5." Slip op., at 30. In fact, although § 9 only applies to transactions involving securities registered on a national securities exchange, it

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[43] Securities and Exchange Commission, *Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934*, H.R. Comm. Print, 77th Cong. 1st Sess. 50 (1941); *see also* 78 Cong. Rec. 7865 (May 1, 1934) (statement of Rep. Wolverton) (§ 9 "recognizes and labels distinctly and unmistakably each and every such fraudulent and improper device heretofore used . . . . [I]n addition to the declaration of criminal responsibility, there is also provided civil liability in favor of any person injured by any such transaction. If anyone should desire to observe a real, genuine set of legislative teeth, he can do so by giving consideration to section [9] of this act.").

has been incorporated by reference into § 10(b) for over-the-counter transactions.[44]

This Court has refused to interpret "the catch all provision of § 10(b) . . . more broadly" than § 9, *Ernst & Ernst*, 425 U.S., at 206, holding that private parties proceeding under either section must demonstrate scienter—intent to "deceive, manipulate or defraud." *Id.*, at 193.

Section 18 of the 1934 Act is also similar to § 10(b). It creates liability for any false or misleading statement in a document filed with the Commission, 15 U.S.C. § 78r(a), and requires a showing of scienter or something closely akin to it. *See Ernst & Ernst*, 425 U.S., at 209 n.28. Conduct that violates § 18 also has been assumed to give rise to a § 10(b) claim. *See, e.g., Wilson* v. *Great American Indus., Inc.*, 855 F.2d 987, 991 (2d Cir. 1988); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 356-57 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *see also Ceres Partners*, slip op., at 30.

In 1938, Congress amended § 29 of the 1934 Act to add an express private right of action to rescind contracts that violate the statute. *See* 15 U.S.C. § 78cc(b). Section 29(b)'s private remedy was "[o]ne of the justifications advanced for implication of a cause of action under § 10(b) . . . ." *Blue Chip Stamps*, 421 U.S., at 723. In fact, the first case to recognize an implied private right of action under § 10(b) found that the claim in that case also "could be grounded upon [§] 29(b) . . . ." *Kardon* v. *National Gypsum Co.*, 69

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[44] *See, e.g., Edward J. Mawod & Co.* v. *SEC*, 591 F.2d 588, 595 (10th Cir. 1979); *SEC* v. *Resch-Cassin & Co.*, 362 F. Supp. 964, 976-78 (S.D.N.Y. 1973). *See generally* McLucas & Angotti, *Market Manipulation*, 22 Sec. & Commodities Reg. 103, 108 (1989) (discussing the substantial overlap between §§ 9 and 10(b)). Other courts also have recognized that the same conduct may be cognizable under both sections. *See Chemetron Corp.* v. *Business Funds, Inc.*, 718 F.2d 725, 727 (5th Cir. 1983); *Wolgin* v. *Magic Marker Corp.*, 82 F.R.D. 168, 179-80 (E.D. Pa. 1979).

F. Supp. 512, 514 (E.D. Pa. 1946). In another early case, the Third Circuit expressly premised its conclusion that a private right of action existed for § 10(b) violations on the "remedy . . . supplied by § 29(b) . . . . " *Slavin* v. *Germantown Fire Insurance Co.*, 174 F.2d 799, 814 (3d Cir. 1949). Section 10(b) private remedies are thus analytically and historically related to § 29(b) claims.

As the Third Circuit recognized in *Data Access*, § 10(b) "and its companion provisions [in the 1934 Act] . . . are aimed at the same objectives." 843 F.2d, at 1548. Indeed,

> [a]ll aim to compensate the same type of injury. All are designed to fill a void in the common law and to create remedies that would be uniform throughout our nation's commercial universe . . . .

Id., at 1548-49; *see also Ernst & Ernst*, 425 U.S., at 204-05. By establishing a one-year/three-year limitations period for actions charging violations of §§ 9, 18 and 29 of the 1934 Act, Congress has therefore "spoken directly to the appropriate statute of limitations for litigation of the sort" involved in § 10(b) cases. *Short*, 908 F.2d, at 1388.[45]

The express remedies of the 1933 Act also overlap with § 10(b).[46] *See Herman & MacLean*, 459 U.S., at 383-86. Indeed, the claims involved in this case—false statements to investors in original offering documents—are analogous to claims for false statements in the offer or sale of a security under § 12(2), 15 U.S.C. § 77*l*(2), as well as a cause of action under § 11, 15 U.S.C. § 77k, for false or

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[45] As discussed in the Brief of Arthur Andersen & Co., *et al.* as Amici Curiae, this manifestation of legislative intent is by itself dispositive of the question presented in this case.

[46] Although §§ 11 and 12 of the 1933 Act do not require proof of scienter, *see Ernst & Ernst*, 425 U.S., at 208, this Court has treated them as generally comparable to § 10(b). *See, e.g., Blue Chip Stamps*, 421 U.S., at 736.

misleading statements in a registration statement. *See Short*, 908 F.2d, at 1388.

In *Herman & MacLean*, 459 U.S., at 383-86, the Court reiterated that the remedial structure of the securities acts is cumulative in nature and suggested that the express and implied remedies should be construed to complement and reinforce one another. *See id.*, at 386, *and cases cited.*[47] Therefore, the same one-year/three-year limitations period that governs the express remedies in the two principal securities acts enacted by the Seventy-Third Congress should also be applied to the remedy implicit in § 10(b).

2. The Federal Policies at Stake—Investor Protection and Market Efficiency—and the Unique Practical Aspects of § 10(b) Litigation Require Application of the One-Year/Three-Year Rule.

The 1933 and 1934 Acts had two similar and overriding policy goals: creating and maintaining healthy and efficient securities markets and ensuring that investors who participated in those markets are adequately protected from fraudulent and deceptive practices. The one-year/three-year limitations period meshed comfortably with these goals. It allowed private claimants adequate time to recover damages for fraud and yet accommodated the interest of the investment community in certainty, stability and repose.

In establishing the one-year/three-year rule, Congress considered and rejected several alternative limitations periods, ranging from two to ten years. The original proposals for the 1933 Act contained no statute of

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[47] In *Herman & MacLean*, 459 U.S., at 387, the Court held, *inter alia*, that a party is not precluded from invoking § 10(b) simply because allegedly fraudulent conduct also might be subject to an express remedy under § 11.

limitations.[48] In the face of criticism,[49] the Senate adopted a bill with a five-year limitations period commencing on the date the cause of action arose.[50] The House responded by proposing a two-year/ten-year limitations provision.[51] The limitations periods of the House bill were eventually adopted for actions under §§ 11 and 12 of the 1933 Act.[52]

Early proposals for the 1934 Act contained a single limitations period of two years[53] and then a two-year/six-year limitations provision.[54] In response to criticism that the proposed 1934 Act and the newly enacted 1933 Act would deter and stifle legitimate business activity,[55] the

[48] *See* S. 875, 73d Cong., 1st Sess. (Mar. 29, 1983), *reprinted in* 3 J. Ellenberger & E. Mahar, *supra* note 4, at Item 28; H.R. 4314, 73d Cong., 1st Sess. (Mar. 29, 1933), *reprinted in* 3 J. Ellenberger & E. Mahar, *supra* note 4, at Item 22.

[49] *See Federal Securities Act: Hearing on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 169 (1933) (statement of William C. Breed, representing the Investment Bankers Ass'n of Am.) (commenting that without a statute of limitations "a crook or an unprincipled lawyer can, not merely next week, but 10 years and 20 years . . . from today" bring suit), *reprinted in* 2 J. Ellenberger & E. Mahar, *supra* note 4, at Item 20.

[50] *See* S. 875, § 9, 73d Cong., 1st Sess. (Apr. 27, 1933), *reprinted in* 1 Fed. Bar Ass'n Sec. L. Comm., *Federal Securities Law Legislative History 1933-1982* 76 (1983).

[51] *See* H.R. 5480, 73d Cong., 1st Sess. (May 4, 1933), *reprinted in* 3 J. Ellenberger & E. Mahar, *supra* note 4, at Item 25.

[52] *See* Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74, *reprinted in* 1 J. Ellenberger & E. Mahar, *supra* note 4, at Item 1.

[53] *See* S. 2693, 73d Cong., 2d Sess. (Feb. 9, 1934), *reprinted in* 11 J. Ellenberger & E. Mahar, *supra* note 4, at Item 34; H.R. 7852, 73d Cong., 2d Sess. (Feb. 10, 1934), *reprinted in* 10 J. Ellenberger & E. Mahar, *supra* note 4, at Item 24.

[54] *See* S. 3420, 73d Cong., 2d Sess. (Apr. 20, 1934), *reprinted in* 11 J. Ellenberger & E. Mahar, *supra* note 4, at Item 37.

[55] *See, e.g.*, 78 Cong. Rec. 7716 (Apr. 30, 1934) (statement of Rep. Ford) ("No more controversial measure has been before the House than

Senate adopted amendments that, *inter alia*, created one-year/five-year statutes of limitations for both the 1933 Act and the proposed 1934 Act.[56] Congress ultimately reduced the limitations period to the one-year/three-year standard that now applies to §§ 9 and 18 of the 1934 Act and §§ 11 and 12 of the 1933 Act.

It is apparent from the legislative history that Congress acted quite deliberately in shortening the outside limitations period from ten years to five years, and, finally, to three years, because it was concerned that a longer limitations period would expose "honest businesses"—and even those accused of improper conduct—to intolerable and inefficient litigation contingencies. For example, a longer limitations period would have created an unhealthy disincentive for individuals to serve as corporate directors and officers.[57]

. . . the securities exchange bill of 1934."); 78 Cong. Rec. 8283 (May 8, 1934) (statement of Sen. Walcott) ("From all sections of the country have come complaints that the Securities Act of 1933 has had the effect of retarding business recovery to a considerable extent.").

[56] *See* H.R. 9323 as passed Senate with Senate Amendments, 73d Cong., 2d Sess. (1934), *reprinted in* 10 J. Ellenberger & E. Mahar, *supra* note 4, at Item 32; 78 Cong. Rec. 8668 (May 12, 1934) (statement of Sen. Fletcher in proposing amendments) (explaining that amendments were intended "to meet objections and criticisms and complaints" that the 1933 Act was "too drastic").

[57] *See, e.g.*, 78 Cong. Rec. 10185 (June 1, 1934) (statement of Sen. Byrnes) (commenting that "[t]he provisions of the Securities Act of 1933 which have caused the greatest complaint are those as to the civil liability of underwriters and of the officers and directors of corporations on account of false statements in the registration statements filed by the corporation"). Senator Byrnes noted that by shortening the limitations period from two years/ten years to one year/three years in the 1933 Act, Congress gave "greater assurance to the honest officials of a corporation." *Id.*; *see also* 78 Cong. Rec. 8198 (May 7, 1934) (statement of Sen. Byrnes) (noting that purpose of outside limitations period was to "bring to an end [the corporate director's] fear, or the fear of his estate, of a suit").

Similarly, Congress sought to protect corporate officials from stale claims by making the outside three-year limitations period absolute, that is, not subject to equitable tolling. *See Norris* v. *Wirtz*, 818 F.2d, at 1332 ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute."); *Short*, 908 F.2d, at 1391; *Data Access*, 843 F.2d, at 1546; ABA Report, *supra* note 34, at 655. Congress was clearly aware that securities violations, particularly those involving fraud, could conceivably be hidden from injured parties for several years. Nevertheless, it rejected arguments that the commencement of the limitations period should be tolled until the plaintiff discovered the violation.[58] For actions governed by the one-year/three-

[58] One of the early proposals for the 1934 Act required that actions be brought within two years after the plaintiff discovered the securities violation but did not set an outside limit on the time for filing suit. Thus, equitable tolling was unlimited until discovery of the right of action. Thomas Corcoran, one of the drafters of this legislation, defended the decision not to include an outside limitations period against heated questioning from Senator Hamilton Kean during a Senate hearing on the legislation. *See Stock Exchange Practices: Hearings on S. Res. 84 and S. Res. 97 Before the Senate Subcomm. on Banking and Currency*, 73d Cong., 1st Sess. 6565 (1934) (Corcoran defending limitations provision, which Senator Kean called "nothing but blackmail"), *reprinted in* 6 J. Ellenberger & E. Mahar, *supra* note 4, at Item 22. Eventually, Senator Kean's position prevailed when a limitations period was added setting a maximum time for filing suit.

Later on the Senate floor, Senator Barkley pointed out the difficulties inherent in setting a limitations period for actions that involve fraud, which he noted was often difficult to discover. *See* 78 Cong. Rec. 8200 (May 7, 1934) (statement of Sen. Barkley) (arguing that Senate needed to distinguish between an injury such as a bodily tort, which is readily discovered, and an injury caused by fraud, which may take several years to discover). He contended that

> it would be manifestly unfair . . . to limit any damaged party to 1 year or 2 years or 3 years in the bringing of a suit, because it may sometimes take 4 or 5 years to discover that a fraud has been committed in a statement of facts or in the omission of a statement with reference to a share of stock or a report which may be made based upon the condition of a company.

Id. Congress definitively rejected Senator Barkley's position and adopted a three-year outside limitations period for most of the express actions under the 1934 Act.

year limitations period, Congress intended for suits to be barred at the end of the three-year period, even if the plaintiff had not discovered the violation by then. 78 Cong. Rec. 8198 (May 7, 1934) (statement of Sen. Fletcher).

Congress, therefore, considered the arguments and firmly decided that private antifraud actions should not be maintainable more than three years after the alleged violation. There are strong reasons to support this decision. Indeed, in the context of § 10(b) actions this Court has stated that

> even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. *The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.*

Blue Chip Stamps, 421 U.S., at 740 (emphasis added);[59] *see also Ernst & Ernst*, 425 U.S., at 214 n.33. In fact,

[59] *In Blue Chip Stamps*, the Court expressly analogized § 10(b) to § 11 of the 1933 Act. It is most significant that the *Blue Chip Stamps* Court went on to emphasize that "Congress itself recognized the potential for nuisance or 'strike' suits in this type of litigation," 421 U.S., at 740, and in 1934 amended § 11 of the 1933 Act to include a provision

"[t]here has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S., at 739.

These "practicalities of litigation" blend with the federal policies that uniformly underlie § 10(b) and the other private antifraud actions to make the finite one-year/three-year period a "significantly more appropriate" limitations period for § 10(b) claims than any conceivable state law alternative.[60] *Cf. Reves* v. *Ernst & Young*, 110 S. Ct. 945, 954 (1990) ("We are unpersuaded that Congress intended the Securities Acts to apply differently to the same transactions depending on the accident of which State's law happens to apply.").

3. The Two Limited Exceptions to the One-Year/ Three-Year Limitations Periods in the 1933 and 1934 Acts Are Not Appropriate for Application to § 10(b) Cases.

There are only two express private rights of action in the 1933 and 1934 Acts not governed by the one-year/ three-year limitations period: § 16(b) of the 1934 Act, 15 U.S.C. § 78p(b), which contains a two-year statute of limitations, and § 20A of the 1934 Act (added by the Insider

allowing courts to require plaintiffs to post an undertaking against costs to act as a deterrent against frivolous suits. The Court concluded that "that fact alone justifies our consideration of such potential in determining the limits of the class of plaintiffs who may sue in an action wholly implied from the language of the 1934 Act." *Id.*, at 741. The Court could also have noted that at the same time in 1934 that the provision regarding undertakings for costs was added, the statute of limitations for private actions under § 11 of the 1933 Act was shortened to the present one-year/three-year standard.

[60] The Commission itself is not limited by the one-year/three-year limitation periods. It has enforcement authority to pursue actions under §§ 11 and 12 of the 1933 Act and §§ 9, 10, 18, and 29 of the 1934 Act at any time, even if more than three years have passed since the violation.

Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA")), 15 U.S.C. § 78t-1, which has a five-year limitations period. For both sections, Congress carved out a narrow class of cases to receive special treatment based upon the unique substantive nature of the cause of action involved.

a. Section 16(b) of the 1934 Act.

Unlike § 10(b), § 16(b) "is not a disclosure section." *Ceres Partners*, slip op., at 32. Section 16(b) permits a shareholder to sue on behalf of a corporation to compel disgorgement of "short-swing" profits of certain corporate insiders[61] who engage in a purchase and sale within a six-month period. It is a prophylactic statute that imposes virtually absolute liability and requires reimbursement of profits even "without proof of actual abuse of insider information, and without proof of intent to profit on the basis of such information." *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973). Because § 16(b) is so different from § 10(b), it requires little elaboration to explain that § 16 is not a proper § 10(b) analog for statute of limitations purposes. Both *Ceres Partners*, slip op., at 32-33, and *Data Access*, 843 F.2d, at 1546, expressly concluded that these substantive differences between § 16(b) claims and claims under §§ 9, 10 and 18 made the two-year limitations period an inappropriate choice for § 10(b) claims.

b. Section 20A of the 1934 Act.

Section 20A of the ITSFEA is also expressly and unambiguously directed toward a narrow species of cases. It provides a remedy against an individual who violates other provisions of the securities acts "by purchasing or selling a security while in possession of material nonpublic infor-

[61] Section 16 applies to directors, officers and any person who is the "beneficial owner" of more than 10% of any class of an equity security. 15 U.S.C. § 78p(a).

mation" in favor of a person who contemporaneously with such transaction also purchased or sold the same class of securities. *See* 15 U.S.C. § 78t-1(a).[62] Section 20A was "specifically intended to overturn court cases which have precluded recovery for plaintiffs where the defendant's violation is premised upon the misappropriation theory." H. R. Rep. No. 910, 100th Cong., 2d Sess., at 26, *reprinted in* 1988 U.S.C.C.A.N., at 6063.[63] Therefore, § 20A permits a remedy for insider trading for violations of other provisions of the 1933 and 1934 Acts in circumstances in which a remedy was not otherwise available under the securities laws.

Section 20A is materially different from § 10(b) in many respects. It is a narrowly tailored private remedy to address a specific violation, whereas § 10(b) is a broad, ov-

[62] Section 20A was only one small part of the ITSFEA legislation. The key feature of the ITSFEA was § 21A, which authorized the Commission to seek treble civil penalties from "controlling persons" in certain insider trading cases. *See* H.R. Rep. No. 910, 100th Cong. 2d, Sess. 15, *reprinted in* 1988 U.S. Code Cong. & Admin. News 6043, 6052 ("U.S.C.C.A.N."). In addition, the ITSFEA created a "bounty" program that allows the Commission to reward informants; mandated that broker-dealers and investment advisers "establish, maintain and enforce written policies 'reasonably designed' to prevent misuse of material, nonpublic information by the firm or any of its employees or associated persons", and increased the maximum term of imprisonment and fines for federal securities law violators. *See* H.R. Rep. No. 910, at 7, *reprinted in* 1988 U.S.C.C.A.N., at 6044.

[63] Such cases relied upon the rationale of *Chiarella* v. *United States*, 445 U.S. 222 (1980), in which the Court held that liability for failure to disclose material, nonpublic information depended upon the existence of a "relationship of trust and confidence" between the parties to a transaction. *Id.*, at 228. Thus, for example, in *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), the Second Circuit held that while misappropriation might provide the basis for a *criminal* prosecution for violation of § 10(b), such conduct did not in and of itself give rise to a private suit for damages absent proof that the defendant owed a fiduciary duty to the plaintiff. *Id.*, at 13-15.

erarching antifraud measure. Section 20A establishes a restitutionary, rather than compensatory remedy, expressly limiting recovery to "profit gained or loss avoided." 15 U.S.C. § 78t-1(b)(1). And it permits a defendant to offset liability for private damages by amounts disgorged in actions brought by the Commission. 15 U.S.C. § 78t-1(b)(2).

When Congress enacted a five-year limitations period for private actions under § 20A, it did not have in mind the panoply of fraudulent and deceptive practices that can form the predicate for a private suit for damages under § 10(b). In fact, Congress squarely addressed this point by stating § 20A was not to be construed to "limit or condition . . . the availability of *any action implied from a provision of this title*." 15 U.S.C. § 78t-1(d). Thus, Congress made it as plain as it could that § 20A, which has prospective effect only, *see* 15 U.S.C. § 78*o* (note), was not intended to modify or affect implied private actions, of which § 10(b) is clearly the most prominent.

Section 20A also explicitly limits application of its five-year statute of limitations to actions "brought under this section." 15 U.S.C. § 78t-1(b)(4). To apply it to § 10(b) actions not brought under § 20A "would let the tail wag the dog." *Short*, 908 F.2d., at 1392. In fact, § 20A is so constrained in its language and limited in its application that to apply its limitations period to one of "the most litigated provisions in the federal securities laws" (*SEC* v. *National Securities, Inc.*, 393 U.S., at 465) would be to let a minnow give birth to a whale.

There is nothing in the legislative history that suggests that the five-year statute of limitations for § 20A claims was intended to apply to § 10(b) implied rights of action. The antecedent Insider Trading Sanctions Act of 1984 ("ITSA"), Pub. L. No. 98-376, § 2, § 21(d)(2)(D), 98 Stat. 1264, 1265, authorized the Commission to seek treble damage penalties from inside traders. Because of the penal, nonremedial nature of the civil penalty actions under the

ITSA, Congress imposed the same limitations period for those actions that it applied to criminal cases brought under the 1934 Act, which are governed by the "catch-all" five-year statute of limitations for federal criminal prosecutions generally, *see* 18 U.S.C. § 3282.[54]

In the 1988 ITSFEA legislation, Congress extended the treble damage penalties for insider trading to certain "controlling persons" of brokerage and securities firms who fail to take adequate steps to prevent insider trading and included a five-year limitations period that was expressly incorporated from the ITSA.[55] Although the legislative history is silent with respect to § 20A's five-year statute of limitations, it appears that it, too, was modeled on the ITSA in order to ensure uniformity and consistency in the parallel enforcement scheme devised by Congress for this very narrow class of insider trading violations.

The five-year limitations period of § 20A thus appears to have its genesis in the criminal law. It therefore "does not reflect any congressional balancing of the competing equities," *Agency Holding*, 483 U.S., at 156 (rejecting application of five-year limitations period for criminal RICO actions to civil RICO claims), that are unique to civil actions for damages under § 10(b).[56]

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[54] *See generally* H.R. Rep. No. 355, 98th Cong., 2d Sess. 30 (reprinting letter from Commission Chairman John Shad to Congressman Timothy Wirth) (noting that five-year limitations period "would conform to the criminal statute of limitations for Exchange Act violations"), *reprinted* in 1984 U.S.C.C.A.N., at 2303.

[55] The House Report accompanying the ITSFEA comments that the limitations clause for § 21A suits "imposes the same statute of limitations as included in present law in Section 21(d)(2)(D) of the Exchange Act [ITSA]." H.R. Rep. No. 910, at 37, *reprinted* in 1988 U.S.C.C.A.N., at 6074.

[56] Deception by silence inheres in insider trading violations, which often involve complex conspiracies between market professionals who operate through impersonal transactions on the open market. *See* H.R. Rep. No. 910, at 15-16, 22-23, *reprinted in* 1988 U.S.C.C.A.N., at 6052-53, 6059-60 (discussing special difficulties of detecting insider trading). Thus, individuals generally will not know the identity of the persons who have defrauded them through inside trading without the benefit of a government investigation, which may take years to complete. A longer limitations period is therefore apt for § 20A violations for reasons that have no application to the more common allegations of fraud presented in this, a typical § 10(b) case, where respondents were apprised of petitioner's identity and role in the transaction even before they made their initial investment.

The paucity of legislative history concerning the limitations provision contained in § 20A confirms that Congress gave the subject little consideration and certainly did not intend for that provision to serve as a standard for the limitations periods of other private rights of action in the federal securities laws. In contrast, as demonstrated above, the extensive legislative history addressing the one-year/three-year limitations provisions of the other express private rights of action reveals an affirmative and considered congressional judgment to reject a five-year limitations period for private civil fraud actions under the federal securities laws.[57]

All of the courts that have considered the issue have rejected § 20A's five-year statute of limitations as an appropriate standard for § 10(b) and have chosen the one-year/three-year period instead. In *Ceres Partners*, the Second Circuit observed that, "plainly Congress felt that unique measures were necessary to curb insider trading, and we are not persuaded that the five-year limitations period specified for that type of action, which has not been designated for any other type of securities claim, was one that Congress meant to apply generally." Slip op., at 35. In *Short*, the court held that "Congress did not say that § 20A applies to all cases under Rule 10b-5 . . . [I]t limited

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[57] As discussed *supra*, at page 39, the Senate proposal for the 1934 Act included a one-year/five-year limitations period, which was rejected in favor of the one-year/three-year statute of limitations.

the scope of § 20A's statute of limitations to a particular and atypical kind of violation."). 908 F.2d, at 1392.[68]

It would be particularly inappropriate and incongruous to choose a limitations period that exceeds the one-year/three-year period contained in the "principal express nonderivative private civil remedies, created by Congress contemporaneously with the passage of § 10(b) . . . ." *Blue Chip Stamps*, 421 U.S., at 735-36. In fact, application of a five-year limitations period for actions under § 10(b) would effectively nullify the one-year/three-year statute of limitations for the expressly created remedies under the 1933 and 1934 Acts. Plaintiffs would simply plead and prosecute those actions under § 10(b). Thus, selection of a judicially borrowed five-year period would have the effect of overriding an express congressional judgment as to the limitations period for these express remedies. *See Ernst & Ernst*, 425 U.S., at 210 (permitting § 10(b) claims to be premised on negligent rather than intentional wrongdoing would 'nullify the effectiveness of the carefully drawn procedural restrictions on these express actions"); *Blue Chip Stamps*, 421 U.S., at 736 n.8; ABA Report, *supra* note 34, at 647 n.19. On the other hand, selection of the one-year/three-year period would not only preserve the congressional determination for the express antifraud remedies in the 1933 and 1934 Acts, but would also leave intact the five-year limitation window for actions under the ITSFEA. As this Court squarely held in *Blue Chip Stamps*, "[i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a ju-

[68] The District Court in *Ceres Partners* also found that § 20A was not a "rational alternative possible analogy" to the one-year/three-year period. 714 F. Supp. 679, 686 (S.D.N.Y. 1989) (Pollack, J.). In *Elysian Federal Savings Bank* v. *First Interregional Equity Corp.*, 713 F. Supp. 737, 743 (D.N.J. 1989), the District Court rejected the argument that the one-year/three-year rule adopted in *Data Access* prior to the enactment of § 20A "should be deemed to be modified" by § 20A's incorporation of a five-year limitations period.

dicially *implied* cause of action beyond the bounds it delineated for *comparable express* causes of action." 421 U.S., at 736. (emphasis added).

CONCLUSION

Neither the state legislatures nor Congress had any intention that private rights of action under § 10(b) of the Securities Exchange Act of 1934 should be governed by state-created statutes of limitations. Section 10(b) is a federal provision, part of a comprehensive interrelated federal regulatory scheme, intended to be enforced uniformly in federal courts in connection with multistate transactions. It is difficult to imagine a measure less amenable to the *ad hoc* application of a parade of conflicting state limitations periods. Practice has demonstrated that this approach has produced no tangible benefits, only a legacy of confusion and expense to litigants and the federal courts and dislocations to the efficient operation of the federal securities laws.

A uniform federal limitations period for § 10(b) actions under the 1934 Act is available in § 9 of the 1934 Act. And it is the same limitations period explicitly applied by Congress to every other comparable antifraud remedy that it created at the same time as § 10(b). It is the only appropriate vehicle for interstitial lawmaking that will not only advance the federal policies and the practicalities of § 10(b) litigation but also effectuate the intentions of Congress.

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Respectfully submitted,

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APPENDIX

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Section 11(a), (b) of the Securities Act of 1933; 15 U.S.C. § 77k:

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of

an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or

purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

• • •

Section 12 of the Securities Act of 1933, 15 U.S.C. § 77l:

§ 77l. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount

of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m:

§ 77m. Limitations of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or section 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

Section 9(a), (b), (c), (e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a), (b), (c), (e):

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or directly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such

security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) Transactions relating to puts, calls, straddles or options

It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or directly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

(c) Endorsement or guarantee of puts, calls, straddles, or options

It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

(e) Persons liable; suits at law or in equity

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity of any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b):

§ 78p. Directors, officers and principal stockholders

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by

the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

Section 18(a), (c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78r(a), (c):

§ 78r. Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such

reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

* * *

(c) Period of limitations

No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 20A of the Securities Exchange Act of 1934, 15 U.S.C. § 78t-1:

§ 78t-1. Liability to contemporaneous traders for insider trading

(a) Private rights of action based on contemporaneous trading

Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) Limitations on liability

(1) Contemporaneous trading actions limited to profit gained or loss avoided

The total amount of damages imposed under subsection (a) of this section shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) Offsetting disgorgements against liability

The total amount of damages imposed against any person under subsection (a) of this section shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions.

(3) Controlling person liability

No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 78t(a) of this title.

(4) Statute of limitations

No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this section with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

(d) Authority not to restrict other express or implied rights of action

Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.

(e) Provisions not to affect public prosecutions

This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties.

Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b):

§ 78cc. Validity of contracts

(b) Contract provisions in violation of chapter

Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have accrued any right thereunder with actual knowledge of the facts by reason of which the making of performance of such contract was in violation of any such provision, rule, or regulation: *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of

any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78*o* of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78*o* of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5:

§ 240.10b-5. Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.